90-282

No.

In The

Supreme Court of the United States

October Term, 1990

FRANK PAVAO,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

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QUESTIONS PRESENTED FOR REVIEW

The issues in this case are rather limited ones involving questions of probable cause under the Fourth Amendment of the United States Constitution as applied to the states by way of the Fourteenth Amendment and of statutory construction of New Jersey's sentencing provisions under N.J.S.A. 39:3-40, driving while on the revoked list. Specifically, the questions presented for review by the Court are:

1. Whether a stop by a police officer of defendant-petitioner's car can be the basis for a lawful arrest and convictions for some motor vehicle violations, even though the police officer's testimony as to probable cause for the initial stop was so lacking in credibility that such testimony was the basis for defendant's acquittals on driving while intoxicated and careless driving charges.

2. Whether, in the absence of specific legislative statement and in light of discretionary language throughout the statutory scheme, the term "shall be subject to", as utilized in N.J.S.A. 39:3-40, can be validly interpreted as a sentencing provision mandating imposition, without suspension, of a jail sentence.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

Petitioner, Frank Pavao, respectfully prays that a writ of certiorari issue to review an order entered by the New Jersey Supreme Court denying Certification of petitioner's appeal from an opinion of the New Jersey Superior Court, Appellate Division which upheld convictions of driving on the revoked list and refusing a breathalyzer test, even though the trial court found that the police officer had no probable cause to stop defendant for drunk driving and careless driving. Consequently, the opinion

of the New Jersey Superior Court, Appellate Division necessarily must be reviewed for purposes of this petition. The Appellate Division's decision upholding the convictions for refusing a breathalyzer test and for driving while on the revoked list, and upholding a one day jail sentence for driving while on the revoked list, was entered March 8, 1990 (App. B, 3a-10a). Defendant thereafter sought Certification for review by the New Jersey Supreme Court. That court denied certification by order dated May 10, 1990 (App. A, 1a-2a).

OPINIONS BELOW

Petitioner, Frank Pavao, was cited for driving while intoxicated (DWI), N.J.S.A. 39:4-50, careless driving, N.J.S.A. 39:4-97, refusal to take a breathalyzer test, N.J.S.A. 39:4-50.2, and driving while on the revoked license list, N.J.S.A. 39:3-40(b). The trial court found that the police officer's evidence was insufficient to sustain the charges of DWI and careless driving. Consequently, the trial judge issued an order acquitting petitioner of those charges. Nevertheless, the trial court's order also set forth the court's judgment of "guilty" in regard to refusal to take a breathalyzer test and to driving while on the revoked list (App. D, 13a-14a).

The petitioner appealed to the New Jersey Superior Court (App. C, 11a-12a), Law Division and the trial court's judgment was affirmed. From there petitioner appealed to the New Jersey Superior Court, Appellate Division. That court, by published opinion, upheld the convictions and the one day jail sentence (App. B, 3a-10a). Petitioner then appealed to the New Jersey Supreme Court for Certification, which was denied (App. A, 1a-2a). Therefore, petitioner essentially is appealing the published opinion of the Appellate Division.

The Appellate Division held in its opinion that the police officer had "an objectively reasonable basis" to stop Mr. Pavao's

vehicle because of the "erratic nature of the vehicle's movement provided an articulable and reasonable suspicion" that Mr. Pavao was driving carelessly or under the influence of alcohol (App. B, 5a). This decision ignores the fact that these criteria for stops of this kind are synonymous for "probable cause". *Delaware v. Prouse*, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979); *State v. Bolte*, 560 A.2d 644, 646 n.1, 115 N.J. 579 (1989); *State v. Mulcahy*, 427 A.2d 368, 107 N.J. 467 (1987); *State v. Chapman*, 495 A.2d. 314, 315 (Me. 1985). Moreover, the New Jersey Appellate Division's decision completely passes over the fact that the trial court and the Law Division found that there was insufficient evidence to sustain the charges of drunk driving and careless driving. One wonders if those courts believed that probable cause was lacking.

While it is true that the municipal and Law Division courts only had to find a reasonable doubt to acquit Mr. Pavao on the DWI and careless driving charges, petitioner submits that, in this particular case, the facts establishing reasonable doubt lead inexorably to the logical conclusion that the officer was not truthful in his testimony. The trooper's testimony was contradicted and impeached by the witnesses. Nevertheless, the Appellate Division took as gospel the trooper's recitation of petitioner's "erratic driving," and concluded the officer had probable cause to stop petitioner for drunk driving and careless driving. Nowhere does the Appellate Division detail what "erratic" driving gave rise to probable cause. In fact, nothing in the record indicates that petitioner had committed a moving violation giving rise to probable cause to stop petitioner.

The Appellate Division then ruled that ambiguous statutory language concerning the discretionary versus the mandatory nature of the provision for a jail term for a second offense for driving while on the revoked license list required at least one day in jail (App. B, 8a-9a). Petitioner submits that where the sentencing provisions under a criminal or quasi-criminal statute is in dispute

and the language of such sentencing provision is ambiguous, the statutory language is to be strictly construed against the State.

STATEMENT OF JURISDICTION

Petitioner has sought judicial review to the highest court in the State of New Jersey, without success. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. Sec. 2101(d) and Sec. 1257(a) to review the application of the principles of Due Process which require probable cause by the New Jersey Superior Court, Appellate Division and to review the method of statutory construction by this State's Courts to find that N.J.S.A. 39:3-40(b) mandates at least one day in jail for violation of the statute, even in the face of ambiguous statutory language and no legislative history supporting the courts' position.

STATEMENT OF THE CASE

This traffic matter involves petitioner's convictions of refusal to take a breathalyzer test, N.J.S.A. 39:4-50.2, and driving while on the revoked list, N.J.S.A. 39:3-40(b) (App. F, 22a-24a). Although petitioner was initially stopped for and was charged with drunk driving, N.J.S.A. 39:4-50, and careless driving, N.J.S.A. 39:4-97, petitioner was acquitted by the municipal judge of those charges (App. D, 13a-14a). Petitioner has sought relief at all levels of the New Jersey judicial system in regard to the conviction for refusal and driving while revoked, to no avail, and now seeks Certiorari from this Honorable Court.

Petitioner owns an automobile shop in Belmar, New Jersey. On January 30, 1988, petitioner worked in his shop until 6:00 p.m., having consumed no alcoholic beverages during the day. At 6:05 p.m. he arrived at Bar Anticipation, in Belmar. There petitioner consumed two beers. While in the bar petitioner was observed by several witnesses who detected no signs of petitioner

being intoxicated. At about 6:30 p.m., petitioner left the bar, intending to go to his home in New Egypt, New Jersey.

As petitioner waited to exit the parking lot in his brown 1981 standard shift Chevette, he observed a state police cruiser stopped in the line of traffic and passing the bar. Petitioner made eye contact with the driver of the state police car, Trooper Henry Meyer. The trooper pulled over to the curb and then pulled in behind petitioner's car.

As the two proceeded, they traversed 25, 35 and 55 m.p.h. zones. While traveling at 35 m.p.h., there was some slight movement within the lane by petitioner's car. Petitioner and the trooper traveled at least two miles, stopping for at least three lights. At each light petitioner could observe the trooper in the rearview mirror. At each light petitioner's car accelerated with difficulty. The night was dark.

Petitioner continued at about 35-40 m.p.h. After turning from Route 35 onto Route 38, a four lane highway, petitioner remained in the right lane and continued at about the same rate of speed. Twice a portion of petitioner's car encroached on the fogline, the solid while line on the right side of the roadway. Once a portion of his car encroached on the left lane heading in the same direction. Petitioner never crossed the center line into the opposing traffic lanes. Other than the trooper's cruiser, no other vehicles passed in the vicinity in either direction. Nevertheless, Trooper Meyer activated his overhead lights and petitioner immediately pulled over. Trooper Meyer made no mention of seeing petitioner at Bar Anticipation. However, Trooper Meyer insisted that he had reason to believe petitioner had been drinking. When petitioner asked why, he received no response.

According to Trooper Meyer, petitioner slurred his speech, staggered, swayed, groaned, had bloodshot eyes and flushed face.

Trooper Meyer claimed that petitioner could barely exit the vehicle and could not perform the balance tests. The trooper arrested Mr. Pavao on the DWI charge and took him to the state trooper barracks at Allenwood, New Jersey. There petitioner was observed by Trooper Lintton, who did not testify at trial. Petitioner refused to submit to a breathalyzer test because Trooper Meyer had not been truthful as to the reason for the stop and petitioner feared that the test results would be faked. Tickets for DWI, refusal to take a breathalyzer test, careless driving and driving while on the revoked list were issued. Petitioner then telephoned Bar Anticipation. The manager and the owner's father came to the State Police barracks in response to the call. Neither of them observed any signs of intoxication on the part of this petitioner. Based upon the facts related thus far, petitioner submits that Trooper Meyer stopped him without the requisite probable cause. *Delaware v. Prouse, supra; State v. Peterson*, 437 A.2d 327, 329, 330, 181 N.J. Super. 261, 265-267 (App. Div. 1981), citing *Jackson v. Virginia*, 443 U.S. 307, 317, 99 S. Ct. 2781, 2788, 61 L. Ed. 2d 560 (1979).

For the following reasons petitioner submits that Trooper Meyer set up an arbitrary and unauthorized random roadblock. *See Delaware v. Prouse, supra; State v. Kirk*, 493 A.2d 1271, 1275, 202 N.J. Super. 28, 37 (App. Div. 1985) Trooper Meyer's patrol area ranged from Aberdeen, New Jersey in the north to Seaside Heights, New Jersey in the south and west to Jackson Township, New Jersey. On occasion the trooper would position himself across from the exits from Bar Anticipation. There was no accident history or particular safety problem with regard to that particular corner of Route 35. Nonetheless, Trooper Meyer had pulled over at least six persons in the vicinity of the bar. Within a week of the Pavao incident Trooper Meyer pulled over two individuals connected with the bar. In the one case, the trooper was observed parked opposite the bar about fifty yards from the entrance. After following the person for five blocks, Trooper

Meyer pulled him over, supposedly for an equipment violation, and inquired if the person had been drinking. Meyer then issued a speeding ticket. In the second case, the bar's cook saw Trooper Meyer parked near the bar. The trooper executed a U-turn, followed the cook and pulled him over two blocks away, with no traffic violation by the cook. The trooper inquired if the cook had been drinking and subjected him to balance tests and a breathalyzer. Despite a 0.04 reading, the cook was not permitted to drive his car home. Note that legal intoxication in New Jersey is 0.10.

Trooper Meyer denied that he was staking out the bar on January 30, 1988 and testified that he just happened to be driving down Route 35 when he came up behind petitioner's car. It is significant, however, that the Superior Court, Law Division specifically assumed that the trooper had been staking out Bar Anticipation.

In the municipal court, petitioner was acquitted on the DWI and Careless Driving charges (App. D, 13a-14a) and was convicted of Refusal to Take a Breathalyzer Test (N.J.S.A. 39:4-50.2) and of Driving While on the Revoked List (N.J.S.A. 39:3-40) (App. D, 13a-14a; App. F, 22a-24a). Sentence on the Refusal charge was a $500.00 fine, $15.00 costs, two years license suspension and twelve hours in the Intoxicated Drivers Resource Center. Sentence on the Driving While Revoked charge (second offense) was $750.00 fine, $15.00 costs, 60 days license suspension and one day in imprisonment (App. D, 13a). As to the one day in jail, the Law Division, following trial *de novo*, found that such a sentence would be excessive if imposed as an exercise of discretion, but that the language of the statute in its opinion, mandated a minimum term of one day imprisonment in the county jail (App. C, 11a-12a).

REASONS FOR GRANTING THE WRIT

This petition raises substantial and important questions as to (1) how far the state may go in condoning random, unsupervised and unauthorized road stops of citizens without probable cause; (2) how much the state may water down the probable cause requirements for stopping and arresting citizens on its highways; and (3) whether the method of statutory interpretation employed by the courts of New Jersey were improper.

In regard to the probable cause issue and the related issue of the random stop, petitioner submits that the exclusionary rule should have applied to invalidate the stop itself. In this case, the officer detected no traffic or equipment violations which would justify stopping Mr. Pavao and the minor movements within his lane on Route 35 were simply too insignificant to justify this stop, *e.g.* - the trooper claimed that once the car went half way over the fogline, once or twice part of the front right wheel crossed the fogline, once the front left wheel encroached part way over the left lane for traffic heading the same direction, and the officer did not know how far petitioner's car crossed those lines, except for the first time. Erratic driving, in and of itself, is not grounds for probable cause to stop a driver for driving while intoxicated. *State v. Bolte, supra.* Compare *State v. Caron*, 534 A.2d 978 (Me. 1987); *State v. Garland*, 482 A.2d 139 (Me. 1984). Rather the stop in this case was pretextual and an uncontrolled exercise of discretion by Trooper Meyer in the field. This type of activity is condemned in *Delaware v. Prouse, supra; State v. Kirk, supra; State v. Egan*, 516 A.2d 1115, 213 N.J. Super. 133 (App. Div. 1986); *State v. Coccomo*, 427 A.2d 131, 177 N.J. Super. 575 (Law Div. 1980); and *State v. Carpentieri*, 403 A.2d 963, 168 N.J. Super 589 (App. Div. 1979), rev'd o.g., 414 A.2d 966, 82 N.J. 546 (1980). The violation of Mr. Pavao's constitutional rights under the United States and New Jersey Constitutions make the stop illegal ab initio and should not be tolerated. *New Jersey Constitution of 1947*,

Article I, paragraph 7 (App. F, 24a); *Delaware v. Prouse, supra; State v. Kirk, supra.*

Because the initial stop in the case at bar was illegal, the convictions for driving while revoked and refusal to take a breathalyzer test both were products of an unlawful stop and arrest. *State v. Bolte, supra* at n.1.; *State v. Mulcahy, supra; State v. Reed*, A-422-87T1, decided August 8, 1988 (unpublished) (App. E, 15a-21a); *State v. Chapman*, 495 A.2d 314, 315 (Me. 1985). Consequently, the exclusionary rule should have been applied to throw out all the evidence in this case and to negate the convictions in this case. *State v. Novembrino*, 491 A.2d 37, 200 N.J. Super. 229 (App. Div. 1985), aff'd 519 A.2d 820, 105 N.J. 95 (1987).

As set forth earlier there is no showing of probable cause for the stop in this case for either drunk driving or careless driving, which were the supposed reasons for the stop. It is significant that petitioner was acquitted of these charges because, under the circumstances, the rejection of part of the State's evidence logically and equally compelled the rejection of the remaining evidence. If the finder of fact had believed Trooper Meyer's litany of signs of intoxication, doubtlessly petitioner would have been convicted of driving while intoxicated. Yet, witnesses observed petitioner shortly before and after the stop and no impairment of any kind was noted. In fact, the trooper himself disclaimed any knowledge of petitioner's drinking or exiting the tavern, even though he stopped petitioner for DWI.

An additional reason the writ should be granted is that the language in the Driving While Revoked statute (N.J.S.A. 39:3-40) is ambiguous since it is open to more than on interpretation. Where statutory language governing criminal and quasi-criminal behavior is unclear, it is to be strictly construed against the State.

In this case, the language in dispute is " . . . shall be subject to imprisonment in the county jail for not more than five days.

. . . " N.J.S.A. 39:3-40(b) (App. F, 23a-24a). The state insists that this language mandates at least one day in jail. Petitioner, on the other hand, submits that the full context of the language indicates discretionary latitude. Thus, if the language is discretionary, the sentence is excessive per the opinion expressed by the Law Division.

If this language were intended to be mandated, the New Jersey Legislature would have said "shall be subject to not less than one day and not more than five days," as it has done everywhere else in the New Jersey Motor Vehicle Code where a mandatory minimum jail term is intended. Moreover, "shall be subject to" often means "being in a position to incur." *See State v. Berglione*, 558 A.2d 51, 54, 233 N.J. Super. 110, 115 (App. Div. 1989); *Wager v. Burlington Elevators, Inc.*, 282 A.2d 437, 116 N.J. Super. 390 (Law Div. 1971); *Webster's Third New International Dictionary* (ed. 1967). Therefore, the New Jersey statute here is ambiguous and subject to more then one interpretation requiring that the language of the statute be strictly construed against the State.

CONCLUSION

For the reasons set forth above, it is respectfully prayed that a writ of certiorari be granted to review the New Jersey courts' treatment of probable cause and method of statutory interpretation.

Respectfully submitted,

Timothy J.P. Quinlan
QUINLAN, DUNNE & HIGGINS
Attorneys for Petitioner

APPENDIX A — ORDER OF THE SUPREME COURT OF NEW JERSEY FILED MAY 10, 1990

SUPREME COURT OF NEW JERSEY

C-812 September Term 1989

31,697

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

FRANK PAVAO,

Defendant-Petitioner.

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court,

A petition for certification of the judgment in A-689-88T2 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 7th day of May, 1990.

s/ Stephen W. Townsend
CLERK OF THE SUPREME COURT

Appendix A

I hereby certify that the foregoing is a true copy of the original on file in my office.

s/ Stephen W. Townsend
CLERK OF THE SUPREME
COURT OF NEW JERSEY

APPENDIX B — OPINION AND ORDER OF THE SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION FILED MARCH 8, 1990

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-689-88T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

FRANK PAVAO,

Defendant-Appellant.

Argued December 18, 1989 — Decided March 8, 1990

Before Judges O'Brien, Havey and Stern.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County.

Nicholas J. Schuldt, III, argued the cause for appellant (Eli Lewis Eytan on the letter brief).

Patricia Bowen Quelch, Assistant Prosecutor, argued the cause for respondent (John Kaye, Monmouth County Prosecutor, attorney; Mark P. Stalford, Assistant Prosecutor, on the letter brief).

Appendix B

The opinion of the court was delivered by HAVEY, J.A.D.

Defendant appeals from his conviction in the Wall Township Municipal Court and again in the Law Division after his trial *de novo* of refusing to take a breathalyzer test, *N.J.S.A.* 39:4-50.2 and driving while on the revoked list, *N.J.S.A.* 39:3-40.[1] On the refusal charge, defendant was fined $500, his driving privileges were revoked for two years and he was ordered to participate 12 hours in the Intoxicated Drivers Resource Center. On the driving while revoked charge, defendant was fined $750, his driving privileges were revoked for an additional 60 days and he was sentenced as a second offender to a one-day jail term.

On appeal, defendant raises the following points:

> *Point I* - Where the trooper's stop of defendant's automobile was pretextual, lacking probable cause and constituting an unjustified investigatory stop, defendant's convictions for refusal and driving while suspended must be reversed.
>
> *Point II* - The sentence of one day imprisonment must be set aside because such sentence was founded upon the trial court's erroneous legal conclusion that such a sentence was mandatory.

We affirm.

The State's proofs established that State Trooper David Meyer observed defendant's vehicle traveling southbound on State

---

1. Defendant was found not guilty of driving while under the influence in the municipal court. *N.J.S.A.* 39:4-50.

Highway 35 in Wall Township. The vehicle was traveling at low rate of speed, was weaving and, on at least two occasions, crossed over the fog line separating the traveled portion of the highway from the shoulder. When the trooper stopped the vehicle, he detected an odor of alcoholic beverage on defendant's breath. When defendant recited the alphabet, he did so in a slow, slurred voice. After defendant had difficulty performing coordination tests at the scene, he was placed under arrest for driving while intoxicated and was transported to the State Police barracks.

We are satisfied that Trooper Meyer had an objectively reasonable basis to stop defendant's vehicle. *See Delaware v. Prouse*, 440 *U.S.* 648, 661, 99 *S.Ct.* 1391, 1400, 59 *L.Ed.*2d 660, 672 (1979); *State v. Weber*, 220 *N.J. Super.* 420, 423 (App. Div.), certif. den. 109 *N.J.* 39 (1987). The erratic nature of the vehicle's movement provided an articulable and reasonable suspicion that defendant was driving carelessly, *N.J.S.A.* 39:4-97, or while under the influence of alcohol, *N.J.S.A.* 39:4-50.

After defendant's vehicle was stopped, the trooper properly asked defendant to alight from the vehicle. *See Pennsylvania v. Mimms*, 434 *U.S.* 106, 111, 98 *S.Ct.* 330, ____, 54 *L.Ed.*2d 331, 337 (1977). When asked for credentials, defendant was unable to produce his driver's license. As stated, his speech was slurred, he had alcohol on his breath and he had difficulty performing roadside physical tests. The State establishes a failure to submit violation by proving "by a preponderance of the evidence" that the "arresting officer had probable cause to believe the [defendant] had been driving . . . while under the influence," and that he refused to submit to the test. *N.J.S.A.* 39:4-50.4a. The Law Division judge's determination that this standard was met is amply supported by the record. *State v. Johnson*, 42 *N.J.* 146, 162 (1964).

Appendix B

The next question is whether the one-day jail term imposed for driving while revoked is sustainable. The Law Division judge concluded that a jail term is mandated for second offenders under *N.J.S.A.* 39:3-40, which provides:

> A person violating this section shall be subject to the following penalties:
>
> * * *
>
> b. Upon conviction for a second offense, a fine of $750.00 and imprisonment in the county jail for not more than five days[.]

In so holding, the Law Division judge followed *State v. Duva*, 192 *N.J. Super.* 418, 421-422 (Law. Div. 1983), which construed the pertinent language to mean that imprisonment in the county jail is mandatory.

Defendant asks us not to follow *Duva*. He reminds us that the statute, being penal in nature, must be strictly construed, and hence the term "shall be subject to" should be interpreted to mean that imposition of a custodial term is discretionary. We do not agree.

Even if a statute is penal in nature, all rules of construction are subordinate to the interpretive goal of ascertaining the intent of the Legislature. *State v. Tischio*, 107 *N.J.* 504, 511, app. dis. 484 *U.S.* 1038, 108 *S.Ct.* 768, 98 *L.Ed.*2d 855 (1988). In that quest, we must consider the policy behind the statute, concepts of reasonableness and legislative history. *Coletti v. Union Cty. Bd. of Freeholders*, 217 *N.J. Super.* 31, 35 (App. Div. 1987).

Appendix B

Prior to *L.*1982, c. 45, *N.J.S.A.* 39:3-40 provided for a fine of not less than $200 nor more than $1,000 *or* imprisonment in the county jail for not more than six months, or both. The statute made no distinction among first, second or third offenders. Thus, the court had discretion whether or not to impose a custodial term, even for second and third offenders.

*L.*1982, c. 45, substituted the present penal scheme which imposes penalties depending upon the status of the offender. The pertinent provisions are as follows:

> A person violating this section shall be subject to the following penalties:
>
> a. Upon conviction for a first offense, a fine of $500.00;
>
> b. Upon conviction of a second offense, a fine of $750.00 and imprisonment in the county jail for not more than five days;
>
> c. Upon conviction of a third offense, a fine of $1,000.00 and imprisonment in the county jail for 10 days;
>
> d. Upon conviction, the court shall impose or extend a period of suspension not to exceed six months;
>
> e. Upon conviction, the court shall impose a period of imprisonment for not less than 45 days, if while operating a vehicle in violation of this section a person is involved in an accident resulting

> in personal injury to another person. [*N.J.S.A.* 39:3-40].

Thus, the present statute provides for a fine for a first offense, but upon conviction for a second offense, the violator "shall be subject to . . . a fine of $750.00 *and* imprisonment in the county jail for not more than five days[.]" [Emphasis added]. In our view, by so mandating, the Legislature intended to divest the sentencing court of its discretion as to whether or not a custodial term should be imposed. *Duva* so held, and we agree. We note, for example, that *N.J.S.A.* 39:3-40b, in using the conjunctive "and," should be compared with other provisions of Title 39 which call for a fine *or* imprisonment in the county jail for not more than a specific term. *See N.J.S.A.* 39:4-96 (reckless driving second offender "shall be punished by imprisonment for not more than 3 months, *or* by fine of not less than $100.00 or more than $500.00, or both."). (Emphasis added).

This interpretation is supported by legislative history. According to the *Senate Law, Public Safety and Defense Committee Statement*, Senate, No.904 — *L.*1982, c. 45, the bill "*increases* the general penalties for the offense of driving" while revoked. The Statement also declares:

> For a first offense, the penalty *would be* a $500.00 fine and a suspension of license for up to 6 months; for a second offense, *a $750.00 fine, a jail sentence of up to 5 days*, and a mandatory suspension of license for up to 6 months; for a third offense, a $1,000.00 fine, a jail sentence of up to 10 days, and a mandatory suspension for up to 6 months. [*See* Senate Statement *L.*1982, c. 45 following *N.J.S.A.* 39:3-10; emphasis added].

Appendix B

The statement clearly states that a fine *and* jail sentence shall be imposed for a second offense.

We cannot accept defendant's argument that the language "subject to" was intended to make a custodial term discretionary. *Black's Law Dictionary* 1278 (5th ed. 1979) defines the term "subject to" as being "[l]iable, . . . answerable for." Hence, the language "shall be subject to . . . imprisonment in the county jail for not more than 5 days," *N.J.S.A.* 39:3-40b, can be read as meaning "shall be ['liable to' or 'answerable for'] imprisonment in the county jail for not more than 5 days[.]" As the Law Division observed in *Duva*, to accept the argument that the words "be subject to" intends to vest discretion in the sentencing court makes the phrase "shall be subject to imprisonment" the functional equivalent of "may be imprisoned for." This result would render the mandatory character of the word "shall" nugatory. *See* 192 *N.J. Super.* at 421. If the Legislature intended that a violator "*may* be imprisoned up to 5 days" for a second offense, it would have so stated.

In support of his argument, defendant also points to *N.J.S.A.* 39:3-40e which provides that the court "*shall impose a period of imprisonment* for not less than 45 days" if the person drives while on the revoked list and is involved in an accident resulting in personal injury to another person. [Emphasis added]. *See also N.J.S.A.* 39:4-50(a)(2) (a second drunk driving offender "shall be sentenced to imprisonment for a term of not less than 48 consecutive hours . . ."). Defendant contrasts the mandatory language of *N.J.S.A.* 39:3-40e with the term "subject to" used in *N.J.S.A.* 39:3-40b, and suggests that the Legislature, in using "subject to," must have intended something less than mandatory jail terms for second offenders.

Appendix B

Defendant ignores the fact that subparagraph e. is also prefaced with the same "shall be subject to" language that prefaces subparagraph b., and therefore can be read to mean "subject to . . . a period of imprisonment for not less than 45 days[.]" Clearly, the Legislature did not intend to make the 45-day term discretionary. *See Senate Law, Public Safety & Defense Committee Statement*, Senate, No. 1207 — *L.*1986, c. 38 (45-day jail term "will be imposed" when accident results in personal injury by another).

Finally, we note that since *Duva's* holding, which we here follow, the Legislature has amended *N.J.S.A.* 39:3-40e, making it clear that the 45 days of imprisonment shall be imposed only when an accident results in personal injury to someone other than the driver. *See L.*1986, *c.* 38. We must assume that the Legislature was aware of the *Duva* holding when it amended subparagraph e. in 1986. *See Quaremba v. Allan*, 67 *N.J.* 1, 14 (1975). Its failure also to amend subparagraph b., in light of *Duva*, may be evidence that *Duva's* construction is in accord with the legislative intent. *See In re Keogh-Dwyer*, 45 *N.J.* 117, 120 (1965); *but see Masse v. Public Employees Retirem. Sys.*, 85 *N.J.* 252, 264 (1981) (inaction demonstrates nothing more than that subsequent legislatures failed to act); and *see Giardina v. Bennett*, 111 *N.J.* 412, 426 (1988).

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

s/ R. Emille Cox
Clerk

APPENDIX C — JUDGMENT OF CONVICTION AND SENTENCE ON APPEAL FILED OCTOBER 25, 1988

SUPERIOR COURT OF NEW JERSEY
Monmouth County Court House
Freehold, New Jersey 07728

SUPERIOR COURT OF NEW JERSEY
COUNTY OF MONMOUTH
LAW DIVISION (CRIMINAL)

APPEAL NO. 164-88

THE STATE OF NEW JERSEY

RESPONDENT

VS.

FRANK PAVAO

DEFENDANT-APPELLANT.

JUDGEMENT OF CONVICTION AND SENTENCE ON APPEAL

THIS MATTER HAVING BEEN BROUGHT BEFORE THE COURT BY DEFENDANT-APPELLANT ON APPEAL FROM THE JUDGEMENT OF CONVICTION ENTERED AGAINST HIM IN THIS CASE IN THE MUNICIPAL COURT OF THE TOWNSHIP OF WALL ON THE 1ST DAY OF JULY, 1988, AND RALPH CRETELLA, LEGAL ASST. FOR THE COUNTY OF MONMOUTH APPEARING, AND THE DEFENDANT-APPELLANT IN PERSON AND BY COUNSEL APPEARING, NICHOLAS SCHULDT, ESQUIRE

Appendix C

IT IS ON THIS 16th DAY OF SEPTEMBER, 1988, ADJUDGED ON TRIAL DE NOVO THAT THE DEFENDANT-APPELLANT IS GUILTY OF THE OFFENSE(S) OF:

39:3-40 DRIVING WHILE SUSPENDED
39:4-50.2 REFUSAL TO TAKE BREATHALYZER TEST.

AS CHARGED, AND IS HEREBY CONVICTED OF SAID OFFENSE(S).

IT IS ADJUDGED THAT THE DEFENDANT-APPELLANT IS HEREBY SENTENCED TO $1,250.00 FINE AND COURT COSTS OF $30.00 PAYABLE TO THE WALL TOWNSHIP MUNICIPAL COURT.

* DRIVING PRIVLEGES IN THE STATE OF NEW JERSEY BE REVOKED FOR A PERIOD OF (2) TWO YEARS AND SIXTY (60) DAYS.
ONE (1) DAY M.C.C.I
12 HOURS I.D.R.C.

s/ John A. Ricciardi
JOHN A. RICCIARDI J.S.C.

[stamped]
ORIGINAL FILED
MONMOUTH COUNTY
OCT 25 1988
JANE G. CLAYTON
DEPUTY CLERK OF THE
SUPERIOR COURT

APPENDIX D — DECISION OF WALL TOWNSHIP MUNICIPAL COURT DATED JULY 1, 1988

WALL TOWNSHIP MUNICIPAL COURT
ALLAIRE ROAD & BAILEY CORNER ROAD
P.O. BOX 1168, WALL, NEW JERSEY 07719

EVAN W. BROADBELT 449-4666 GAIL W. CONNORS
JUDGE COURT CLERK

July 1, 1988

Frank Pavao
P.O. Box 33
New Egypt, New Jersey 08533

Joseph A. Zampardi, Esq.
506 Hooper Avenue
Toms River, New Jersey 08753

Dear Sirs:

Judge Broadbelt has rendered his decision on the four summons as follows: 39:4-50 Not Guilty, 39:4-97 — Not Guilty. 39:3-40 Guilty fine $750. cost $15. revoke dl for 60 days. and 39:4-50.2 Guilty Fine $500. and $15. cost $15. all due forthwith. Revocation on the 39:4-50.2 is 2 years and your drivers license must be turned in immediately. You also must serve 12 hours with the Intoxicated Drivers Resource Center. You will be advised when to do so.

If you have any questions please advise. You have 20 days in which to file an appeal.

Appendix D

Very truly yours,

s/ Gail W. Connors
Gail W. Connors

cc: court

APPENDIX E — OPINION ORDER IN STATE OF NEW JERSEY V. JOHN M. REED FILED AUGUST 8, 1988

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOHN M. REED,

Defendant-Appellant.

Submitted June 21, 1988 - Decided August 8, 1988

Before Judges Pressler and Gaynor.

On appeal from Superior Court, Law Division, Ocean County.

Stuart D. Synder, attorney for appellant (Roni J. Daniels, on the brief).

James W. Holzapfel, Ocean County Prosecutor, attorney for respondent (Samuel J. Marzarella, Assistant County Prosecutor, on the brief).

PER CURIAM

Following a trial before the Municipal Court of Surf City, defendant was acquitted of the charge of operating a motor vehicle while under the influence of intoxicating liquor, *N.J.S.A.* 39:4-50, but convicted of refusing to submit to a breathalyzer test in

violation of *N.J.S.A.* 39:4-50.2. As a second offender, his driving privileges in New Jersey were revoked for a period of two years and a fine of $250 was imposed. On his appeal to the Law Division, he was found guilty of the same offense and similar sanctions were imposed. On this appeal, defendant presents the following appellate arguments:

> I. WHETHER THE MUNICIPAL COURT ERRED IN ADMITTING THE TESTIMONY OF THE POLICE OFFICER IN VIOLATION OF *R.* 7:4-2(g).
>
> II. WHETHER THE CONVICTION SHOULD BE REVERSED DUE TO THE COURT'S ERRONEOUS DETERMINATION THAT PROBABLE CAUSE EXISTED FOR THE INITIAL STOP OF THE VEHICLE.
>
> III. WHETHER THE CONVICTION SHOULD BE REVERSED DUE TO THE COURT'S ERRONEOUS DETERMINATION THAT THE ARRESTING OFFICER HAD REASONABLE GROUNDS TO BELIEVE THE DEFENDANT HAD BEEN OPERATING A MOTOR VEHICLE IN VIOLATION OF *N.J.S.A.* 39:4-50.

We are satisfied from our review of the record in light of the applicable principles of law that there is clearly no merit to the argument advanced in Point I in support of defendant's contention that a reversal of his conviction is required. *R.* 2:11-3(e)(2). However, we are satisfied that the stop of defendant's vehicle was arbitrary, random and wholly without justification

and thus an unconstitutional seizure. The subsequent arrest and the consequences thereof, being the fruit of the random stop, were thus tainted and rendered invalid. Accordingly, the refusal conviction cannot stand. This conclusion renders it unnecessary for us to consider defendant's Point III.

We adopt the following factual findings of the Law Division judge bearing upon the justification for the officer's stop of defendant's vehicle:

> Now, this Court finds the facts as follows: On November 17th, 1986, after one o'clock in the morning defendant's automobile was observed crossing the center line of Long Beach Boulevard by one Officer Furlong who observed the car then make a west turn, or left turn west. He was either in Ship Bottom or Surf City on a routine patrol. He was going north to that section of Long Beach Township, which encompasses Loveladies. Later on he saw what he believed to be the same car. It was going north. He also went north behind it, and at the time he was in the left lane.
>
> He testified that there was a sudden change in the, not that there was a left turn right in front of him in the sense that the driver cut him off, but he moved over in front of him. Then he observed the car again, attempted to stop it by turning on his overhead lights, and the defendant continued to proceed and not pulling over to the shoulder of the road. When Marina Lane came up the defendant turned left into Marina Lane. The policeman followed him, the lights and siren

> on, according to the policeman; still failed to pull over. Defendant eventually pulled up in his own driveway and exited the vehicle.

It is noteworthy that the officer, in his testimony before the municipal court, was unable to specify any motor vehicle violation committed by defendant, or to indicate other circumstance giving rise to a reasonable suspicion of unlawful conduct justifying the pursuit and stop of the vehicle. Although stating that defendant made an abrupt lane change, the officer did not consider this movement of the vehicle to be an unlawful lane change as he could not say that defendant's directional signal had not been operating. In response to a further inquiry as to the reason for the stop, the officer testified;

> Probably, to the best of my recollection since I can't testify that he in fact, did or did not have his turn signal on, and whether or not I would or would not have been in his sight, probably careless operation at that time might be — might be the appropriate statute for the culmination of that particular maneuver, I don't know, possibly it could be failure to keep right. I would have to — he wasn't charged with that so I didn't dwell on that, sir.

We learn from *Delaware v. Prouse*, 440 *U.S.* 648, 99 *S.Ct.* 1391, 59 *L.Ed.*2d 660 (1979), that random investigatory stops of motor vehicles made without probable cause or reasonable suspicion are unconstitutional. There, the court noted that the stopping of a vehicle and detaining its occupants constituted a seizure within the meaning of the Fourth and Fourteenth Amendments and was lawful only if grounded in some rational

basis for the deployment of such intrusive law enforcement action. In this respect, the court observed:

> To insist neither upon an appropriate factual basis for suspicion directed at a particular automobile nor upon some other substantial and objective standard or rule to govern the exercise of discretion "would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches . . . ." Terry v Ohio, 392 US, at 22, 20 L.Ed 2d 889, 88 S Ct 1868, 44 Ohio Ops 2d 383. By hypothesis, stopping apparently safe drivers is necessary only because the danger presented by some drivers is not observable at the time of the stop. When there is not probable cause to believe that a driver is violating any one of the multitude of applicable traffic and equipment regulations — or other articulable basis amounting to reasonable suspicion that the driver is unlicensed or his vehicle unregistered — we cannot conceive of any legitimate basis upon which a patrolman could decide that stopping a particular driver for a spot check would be more productive than stopping any other driver. This kind of standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent. [440 *U.S.* at 661; citations omitted.]

We have also recently concluded that the rights of our citizens to travel the highways of our State without police interdiction

is similarly protected under Art. I, par. 7 of our State Constitution. *State v. Kirk*, 202 *N.J. Super.* 28, 35-36 (App. Div. 1985).

Here, there was no motor vehicle violation observed by the officer nor any factual basis for an articulable suspicion of criminal conduct on the part of the driver or occupant of the automobile providing probable cause or justification for the stopping of defendant's vehicle. *See State v. Kirk*, 202 *N.J. Super.* at 55-56. The absence of such standard governing the action of the officer in the present case permitted him to thus act upon an inarticulate hunch in infringing upon defendant's reasonable expectation of privacy while traveling in his automobile. As *Prouse* instructs us, the grave danger of abuse of discretion does not disappear simply because the automobile is subject to state regulation resulting in numerous instances of police-citizen contact. 440 *U.S.* at 662. While we are not unmindful of the dangers and serious threats to public safety posed by drunk drivers on our highways, such compelling interests do not justify the use of indiscriminate efforts at law enforcement. *State v. Kirk*, 202 *N.J. Super.* at 55-56.

As the proofs failed to establish that the stopping of defendant's vehicle was justified under the circumstances, and thereby permissible as a valid warrantless seizure, defendant's subsequent arrest for the alleged violation of *N.J.S.A.* 39:4-50 resulting in his conviction for refusing to submit to a breathalyzer test cannot stand as being the fruit of a constitutionally objectionable random investigatory stop.

The judgment of conviction is therefore reversed.

[stamped]
ORIGINAL FILED
APPELLATE DIVISION
AUG 8 1988

Appendix E

s/ Josh G. Trubenbash
Clerk

[stamped]
FILED
AUG 1 1988
M. DEAN HAINES
CLERK COUNTY OF OCEAN

APPENDIX F — RELEVANT STATUTES

Last additions in text indicated by *italics*; deletions by —.

39:4-50.2. Consent to taking of samples of breath; record of test; independent test; prohibition of use of force; informing accused

(a) Any person who operates a motor vehicle on any public road, street or highway or quasi-public area in this State shall be deemed to have given his consent to the taking of samples of his breath for the purpose of making chemical tests to determine the content of alcohol in his blood; provided, however, that the taking of samples is made in accordance with the provisions of this act and at the request of a police officer who has reasonable grounds to believe that such person has been operating a motor vehicle in violation of the provisions of R.S. 39:4-50.

(b) A record of the taking of any such sample, disclosing the date and time thereof, as well as the result of any chemical test, shall be made and a copy thereof, upon his request, shall be furnished or made available to the person so tested.

(c) In addition to the samples taken and tests made at the direction of a police officer hereunder, the person tested shall be permitted to have such samples taken and chemical tests of his breath, urine or blood made by a person or physician of his own selection.

(d) The police officer shall inform the person tested of his rights under subsections (b) and (c) of this section.

(e) No chemical test, as provided in this section, or specimen necessary thereto may be made or taken forcibly and against physical resistance thereto by the defendant — *The* police officer shall, however, inform the person arrested of the consequences

of refusing to submit to such test — *in accordance with section 2 of this amendatory and supplementary act.*[1] A standard statement, prepared by the director, shall be read by the police officer to the person under arrest.

Amended by L.1977, c. 29, § 3; L.1981, c. 512, § 1, eff.Jan. 12, 1982.

39:3-40. Driving when license refused, suspended, revoked or prohibited; motor vehicle license revoked; punishment

No person to whom a driver's license has been refused or whose driver's license or reciprocity privilege has been suspended or revoked, or who has been prohibited from obtaining driver's license, shall personally operate a motor vehicle during the period of refusal, suspension, revocation, or prohibition.

No person whose motor vehicle registration has been revoked shall operate or permit the operation of such motor vehicle during the period of such revocation.

A person violating this section shall be subject to the following penalties:

a. Upon conviction for a first offense, a fine of $500.00;

b. Upon conviction for a second offense, a fine of $750.00 and imprisonment in the county jail for not more that five days;

c. Upon conviction for a third offense, a fine of $1,000.00 and imprisonment in the county jail for 10 days;

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1. Section 39:4-50.4a.

Appendix F

d. Upon conviction, the court shall impose or extend a period of suspension not to exceed six months;

e. Upon conviction, the court shall impose a period of imprisonment for not less than 45 days, if while operating a vehicle in violation of this section a person is involved in an accident resulting in personal injury *to another person.*

Nothwithstanding subsections a. through e., any person violating this section while under suspension issued pursuant to R.S. 39:4-50, upon conviction, shall be fined $500.00, shall have his license to operate a motor vehicle suspended for an additional period of not less than one year nor more than two years, and may be imprisoned in the county jail for not more than 90 days.

Amended by L.1981, c. 38 § 1, eff. Feb. 12, 1981; L.1982, c. 45, § 2; L.1983, c. 90, § 1, eff. March 11, 1983; L.1986, c. 38, § 1, eff. June 25, 1986.

New Jersey Constitution of 1947, Article I

Freedom from unreasonable searches and seizures; warrant

7. The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized.